SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000097-001 DT 12/02/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

DENISE L SHARP

JOHN P TATZ

v.

ARIZONA STATE DEPARTMENT OF TRANSPORTATION (001)
VICTOR MENDEZ (001)
STACEY K STANTON (001)

JOHN C DUTTON

OFFICE OF ADMINISTRATIVE HEARINGS

MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.[1] The reviewing court may not substitute its own discretion for that exercised by the agency,[2] nor may it act as the trier of fact,[3] but must only determine if there

[1] *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980).
[2] *Ariz. Dept.of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).
[3] *Siler v. Arizona Dept. of Real Estate*,193 Ariz. 374, 972 P.2d 1010 (App. 1998).

is any competent evidence to sustain the decision.[4] This court may not function as "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.[5]

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the administrative hearing, exhibits made of record and the memoranda submitted. Here, Plaintiff, Denise L. Sharp, seeks review of the Arizona Department of Transportation – Motor Vehicle Division's (Defendant) administrative order. After a careful review of the record, I find sufficient competent evidence to affirm the decision of the Arizona Department of Transportation – Motor Vehicle Division.

Facts

On October 25, 2002, Officer Roberson, of the Scottsdale Police Department, was called to assist another officer in a traffic stop. Upon arriving at the scene, Officer Roberson contacted Plaintiff and observed signs of impairment. Plaintiff admitted drinking two glasses of wine. The officer conducted the HGN eye test and noted that Plaintiff presented six out six cues of impairment. During instructions for the field sobriety test, Plaintiff declined any further testing. At this point, Plaintiff was arrested for driving under the influence of alcohol, pursuant to A.R.S. §28-1381. Plaintiff then requested and submitted to a preliminary breath test that she had previously refused. The officer read Plaintiff her Admin Per Se rights and asked Plaintiff to take a blood test, which Plaintiff refused. After the officer warned Plaintiff of the consequences of refusing the blood test, Plaintiff agreed to submit to the test. Plaintiff was taken to the hospital and was given a hospital waiver form, which Plaintiff refused to sign, stating that she was afraid of needles. Again, Plaintiff agreed to the test and a phlebotomist was called. The blood draw was unsuccessful due to Plaintiff's shaking. Plaintiff requested a urine draw, but her request was denied. Further, a breath test on the Intoxilyzer 5000 was available at the police station, but the officer did not opt for this test.

When the phlebotomist attempted to draw from Plaintiff's other arm, Plaintiff protested and said she wasn't going to submit to the blood test until she spoke to her mother. After the officer told Plaintiff she was not entitled to any further delay, Plaintiff said she would not provide the sample. Officer Roberson then served Plaintiff with a 12-month Order of Suspension for refusing to submit to a chemical test. Plaintiff was then taken to the police station and a search warrant was secured to draw Plaintiff's blood. The blood draw was without incident. Upon Plaintiff's request, an administrative hearing was held on December 9, 2002, where the administrative law judge affirmed the 12-month suspension of Plaintiff's license. Plaintiff now brings the matter before this court.

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[4] *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).

[5] *DeGroot v. Arizona Racing Com'n*,141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984).

Issue

The issue before this court is whether the Defendant agency's decision to affirm the implied consent suspension was supported by substantial evidence, contrary to law, or an abuse of discretion. Specifically, Plaintiff claims she was incapable of submitting to the blood test because of her fear of needles.

Analysis

While Arizona case law does not directly address this issue, other states have, and they provide some persuasive authority and logic in the matter at hand. Pennsylvania courts have consistently held that the fear of needles is no justification for refusal to take a required blood test.[6] In Idaho, a fear of needles *may* establish sufficient cause for refusing to submit to a blood test if the fear is of such a magnitude that as a practical matter the defendant is psychologically unable to submit to the test, and if the fear is sufficiently articulated to the police officer at the time of refusal so that the officer is given an opportunity to request a different test.[7] Nothing in the record supports a claim that Plaintiff's fear of needles was of such a magnitude that Plaintiff was psychologically unable to submit to the test. In fact, Plaintiff stated that she would not submit to the blood test until she spoke with her mother. To further support the agency's decision to suspend Plaintiff's license, Plaintiff requested smaller needles for the blood draw. One who is so fearful of needles that they are psychologically unable to submit to blood tests, do not condition their submission to blood tests on smaller needles or the presence of another person.

Allowing claims of fear of needles to excuse drunk drivers from taking blood tests would undermine an officer's discretion[8] in the matter of BAC testing options. Further, if an officer were faced with an objection to a blood draw based on a fear of needles, the officer would have very little basis for evaluating the reasonableness of that objection. How would the officer know whether the objection was based on a genuine and intense fear, or on a very common preference not to have one's skin pierced with a needle, or on a desire not to permit the gathering of evidence of intoxication? The fear of needles excuse would open the door for gamesmanship and delays by the drunk drivers. Among the legislature's purposes in enacting DUI statutes are removing impaired drivers from highways, easing the State's burden of proving intoxication, and increasing the certainty that impaired drivers are penalized even if they refuse testing.[9]

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[6] *Department of Transportation, Bureau of Driver Licensing v. Mease,* 148 Pa.Cmwlth. 14, 610 A.2d 76, 78 (1991).
[7] *In re Griffiths,* 113 Idaho 364, 370, 744 P.2d 92, 98 (1987).
[8] A.R.S. §28-1321(A); also see *Schade v. Department of Transp.*, 175 Ariz. 460, 857 P.2d 1314 (App. 1993).
[9] *Caretto v. Arizona Dept. of Transp.*, 192 Ariz. 297, 965 P.2d 31, 2636 Ariz. Adv. Rep. 10 (App. 1998).

Arizona law does not give motorists charged with DUI the right to refuse testing for alcohol concentration or drug content; it only gives them the power to refuse and provides for certain consequences of such a refusal.[10] A.R.S §28-1321 (B) states (in relevant part):

> A failure to expressly agree to the test or successfully complete the test is deemed a refusal.

Plaintiff refused the blood test on several occasions, and failed to successfully complete the first blood test. Further, Plaintiff toyed with the officer, making the blood test conditional upon her being able to speak with her mother. Once the officer secured a search warrant, the Plaintiff submitted to the blood test without any problems.

Conclusion

Only where the administrative decision is unsupported by competent evidence may this court set it aside as being arbitrary and capricious.[11] In determining whether an administrative agency has abused its discretion, I review the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."[12] On an appeal of a license suspension under the implied consent statute, the reviewing court must view evidence in the Motor Vehicle Division administrative record in the light most favorable to sustaining the ALJ's decision, which may be set aside only if it is unsupported by competent evidence.

This court affirms the administrative agency's decision, for it was clearly supported by substantial evidence. Plaintiff had the ability to submit to the blood test, as evidenced by her submission to the blood draw subsequent to the search warrant being secured. Plaintiff simply refused to cooperate with the officer and attempted to dictate which tests she would take, thus ignoring the officer's discretion regarding such matters.

IT IS ORDERED affirming the decision of the Arizona Department of Transportation – Motor Vehicle Division.

IT IS FURTHER ORDERED denying all relief as requested by the Plaintiff in her complaint.

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[10] *Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 203 Ariz. 326, 54 P.3d 355, 382 Ariz. Adv. Rep. 6 (App. 2002).
[11] *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1976).
[12] *Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz.App. 91, 94, 495 P.2d 861, 864 (1972), as cited by *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981).

IT IS FURTHER ORDERED that counsel for the Defendant shall prepare and lodge a judgment consistent with this minute entry opinion no later than December 17, 2003.